A **BLUE OCEAN BIOTECH SDN BHD v. PENGARAH TANAH DAN DAERAH GALIAN NEGERI PERAK & ORS**

HIGH COURT MALAYA, IPOH
ANSELM CHARLES FERNANDIS JC
[CIVIL SUIT: AA-22NCVC-20-02-2017]
B 30 APRIL 2018

CIVIL PROCEDURE: *Striking out – Application for – Application to strike out claim – Writ of summons and amended statement of claim – Land matters – Whether pleadings disclosed reasonable cause of action – Whether abuse of process*
C *of court – Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c) & (d)*

CIVIL PROCEDURE: *Mode of commencement – Challenging act of public authority – Land matters – Whether filing of writs of summon proper – Whether should have been by way of judicial review – Rules of Court 2012, O. 53*

D ***LAND LAW:*** *Licence – Temporary occupation licence – Applicant's temporary occupation licence not renewed by State Authority – Whether applicant had proprietary rights over land – Whether State Authority could decline to renew temporary occupation licence – Whether State Authority had any statutory duty to explain reason for cancellation of temporary occupation licence – National Land*
E *Code, s. 65(1)*

LIMITATION: *Public authorities – Filing of suit – Lands matters – Action against public authority – Whether within time stipulated – Whether action time-barred – Public Authorities Protection Act 1948 s. 2(a)*

F By way of a letter, the State Authority ('the SA') agreed to issue a temporary occupation licence ('TOL') for a piece of land, pursuant to s. 65(1) of the National Land Code, to the plaintiff for agricultural purposes. The plaintiff subsequently applied for a lease of 99 years on the said land but the application was rejected by the SA. The SA cancelled the TOL to the plaintiff and, instead, transferred the land to the third defendant. The plaintiff was
G informed of the cancellation ('the cancellation letter') and, as a result, the plaintiff's TOL was not renewed the following year. Aggrieved, the plaintiff filed the present claim for (i) declarations that (a) the alienation of the land by the first defendant to the third defendant was invalid and against the law and the third defendant had wrongly accepted the alienation; (b) the plaintiff
H was entitled to the said land; and (c) the TOL be cancelled, revived and reinstated; (ii) an injunction to prevent the third defendant from leasing or charging the land; (iii) special damages for grant obtained and for costs of infrastructure; (iv) general damages; and (v) loss of profits due to the cancellation of the project. The defendants applied to strike out the plaintiff's
I claim under O. 18 r. 19(1)(a), (b), (c) or (d) of the Rules of Court 2012 ('the ROC') on the grounds that the plaintiff's (i) writ of summons and amended statement of claim did not disclose a reasonable cause of action or recognisable cause of action against the defendants; (ii) action contravened

O. 53 of the ROC since the decision of the SA, in cancelling the approval of the plaintiff's application for the TOL, could only be challenged in court by way of judicial review; and (iii) claims were caught by limitation under the Public Authorities Protection Act 1948 ('the PAPA').

Held (allowing defendant's application):

(1) Under the provisions for granting the TOL, the SA can, at any time, decline to renew the TOL if, for any reason, the Government requires the said land back. The said land, being under TOL, the plaintiff did not have any proprietary rights over it. The plaintiff was merely permitted to occupy the said land at a yearly licence. Furthermore, the SA had, on a previous occasion, rejected the plaintiff's application for the TOL to be converted into a 99-year lease. Therefore, it should have dawned upon the plaintiff that the SA had no intention of granting any more than the right to merely occupy the said land under the TOL. The plaintiff incurred expenses fully aware that they would not be recoverable in the event the TOL was cancelled. Therefore, the defendants had the right to issue the cancellation letter. There was no statutory duty for the SA to explain the reason for the cancellation of the TOL. (paras 25, 26, 28 & 29)

(2) It was not contested that the plaintiff had made use of the land for commercial purposes. The relationship between the plaintiff and the SA leaned towards a contractual relationship. The nature of the damages claimed included loss of profit made this case more amenable to an action by way of writ. The plaintiff's claim was also monetary in nature rather than a substantive right. The defendants' contention, that the plaintiff should have proceeded by way of judicial review under O. 53 of the ROC, could not be agreed with. The facts of the case showed a mixture of private and public law with the private law dominating the public law element. (para 30)

(3) The action brought by the plaintiff was time-barred by virtue of s. 2(a) of the PAPA as it was commenced some four years and four months after the TOL was cancelled by the SA. There was no explanation for this delay. Although the plaintiff prayed for various declarations, these declarations lacked enforceability as the said land had already been occupied by the third defendant for nearly six years. The declarations prayed for were ways or means employed by the plaintiff to recover damages together with interests. It was exceedingly clear that these prayers, read together with other prayers in the plaintiff's claim, would therefore come within s. 2(a) of the PAPA. Any action brought outside the limitation period to commence the action could be struck out for being frivolous, scandalous and vexatious and also an abuse of the process of the court. (paras 31, 37 & 38)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Balare Jabu & Ors v. Merawa Sdn Bhd & Ors [2011] 4 CLJ 751 CA ***(dist)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Castro v. Murray (1875) LR 10 Ex 213 ***(refd)***

Cepatwawasan Group Bhd & Anor v. Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors [2008] 2 CLJ 620 HC ***(refd)***

Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor [1978] 1 LNS 44 FC ***(dist)***

Director of Forests, Sarawak & Anor v. Balare Jabu & Ors And Another Appeal [2012] 7 CLJ 685 FC ***(dist)***

Gabriel Peter & Partners (suing as a firm) v. Wee Chong Jin [1998] 1 SLR 374 ***(refd)***

Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd [2011] 1 CLJ 285 CA ***(refd)***

Hj Hussin Hj Ali & Ors. v. Datuk Hj Mohamed Yaacob & Ors And Other Cases [1983] 2 CLJ 68; [1983] CLJ (Rep) 165 FC ***(refd)***

Ho Nim Tsin v. The Director Of Land And Survey Department & Anor [2013] 5 CLJ 1004 HC ***(foll)***

Husli Mok v. Superintendent Of Lands & Survey & Anor [2012] 1 LNS 969 CA ***(refd)***

Lim Lek Yan v. Yayasan Melaka [2013] 1 CLJ 1081 HC ***(refd)***

Linde Gas Malaysia Sdn Bhd v. Pasifik Utama Sdn Bhd & Anor [2011] 5 CLJ 40 CA ***(refd)***

Lionel Lau Siang Kok v. Datuk Seri Panglima Lau Cho Kun [2013] 1 CLJ 619 CA ***(refd)***

Litus Jau & Anor v. Boustead Pelita Tinjar Sdn Bhd & Ors [2014] 1 CLJ 880 CA ***(refd)***

Majlis Amanah Rakyat (MARA) v. Tam Seek Hong & Ors [1994] 3 CLJ 64 HC ***(refd)***

Middy Industries Sdn Bhd & Ors v. Arensi-Marley (M) Sdn Bhd [2012] 1 LNS 830 CA ***(refd)***

Papoo v. Veeriah [1959] 1 LNS 70 HC ***(foll)***

Piagamas Maju Sdn Bhd lwn. Pengarah Tanah Dan Galian Negeri Selangor & Satu Lagi [2013] 2 CLJ 824 HC ***(refd)***

Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 FC ***(refd)***

Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam & Anor [2006] 2 CLJ 150 CA ***(refd)***

Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor [2007] 6 CLJ 245 FC ***(refd)***

Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC ***(refd)***

SR Katherine Lim KH v. Ketua Pengarah Perkhidmatan Perubatan Malaysia, Kementerian Kesihatan Malaysia & Ors [1997] 2 CLJ 564 CA ***(dist)***

Tan Sri Dato' Eric Chia Eng Hock v. NKK Corporation (Japan)) [2004] 7 CLJ 137 HC ***(refd)***

Tan Sri Halim Saad v. Tan Sri Nor Mohamed Yakcop & Ors [2014] 4 CLJ 232 HC ***(refd)***

Technointan Holding Sdn Bhd v. Tetuan Tan Kim Siong & Teh Hong Jet [2006] 7 CLJ 541 HC ***(refd)***

Teh Guan Teik v. Inspector-General of Police & Anor [1998] 3 CLJ 153 FC ***(dist)***

Legislation referred to:
Immigration Act 1959/1963, s. 65
National Land Code, ss. 42, 65(1)(a), 66, 67(1)
Public Authorities Protection Act 1948, s. 2(a)
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d), O. 53

For the plaintiff - Zulkifli Zabidin; M/s Kumar Jaspal Quah & Aishah
For the 1st & 2nd defendants - Teoh Chin Chong; State Legal Advisor, Perak
For the 3rd defendant - Justine Devakumar; M/s Wan & Wan

Reported by Najib Tamby

JUDGMENT

Anselm Charles Fernandis JC:

Introduction

[1] This as an application under O. 18 r. 19 of the Rules of Court 2012 (ROC) by the first and second defendants (collectively known as "the defendants") to strike out the plaintiff's writ and statement of claim. The third defendant was not a party to this application.

Brief Facts

[2] The State Authority (SA) had agreed to issue a temporary occupation licence ("TOL") under s. 65(1)(a) of the National Land Code ("NLC") to the plaintiff for purpose of agriculture namely fish farming (ternakan ikan) in an area of 12.140 hectares at Wilayah Pasir Panjang Mukim Pengkalan Bharu Daerah Manjung (the said land). The plaintiff had been informed of this by the first defendant by way of a letter dated 13 April 2010 (the said letter). The said letter also contained the provisions as regards to the granting of the TOL to the plaintiff. The said letter was exhibited in the plaintiff's affidavit in reply to this application dated 8 August 2017.

[3] It was not in dispute that the plaintiff had unconditionally accepted the provisions concerning the TOL contained in the said letter. Subsequently, the plaintiff applied for a lease of ninety-nine years on the said land. This was however rejected by the SA.

[4] Following this, on 10 October 2012 the SA had cancelled the TOL to the plaintiff and transferred the said land to the third defendant for purposes of a fish breeding factory site ("tapak perusahaan kilang pembenihan ikan"). This resulted in the plaintiff's TOL not being renewed for the subsequent year. The plaintiff was informed of this development by the first defendant by way of a letter dated 27 November 2012 (the cancellation letter). The plaintiff being aggrieved by this decision filed a writ action and claimed, among others, for the following reliefs against all the defendants.

(i) A declaration that alienation of the said land by the first defendant to the third defendant was invalid and against the law;

(ii) A declaration that the third defendant had wrongly accepted the said alienation from the defendants;

(iii) A declaration that the plaintiff is entitled to the said land;

(iv) A declaration that the TOL that is cancelled is revived and reinstated;

(v) An injunction to prevent the third defendant from leasing or charging the said land;

(vi) Special damages for cost of infrastructure totalling RM384,000;

(vii) Special damages concerning the grant obtained by the plaintiff for their project amounting to RM2,616,000;

(viii) Loss of profits because of the cancelling of the project; and

(ix) General damages

[5] The defendants then applied to strike out the plaintiff's claim under O. 18 r. 19(1)(a), (b), (c) or (d) of the ROC.

Issues To Be Considered

[6] Essentially, three issues were brought forth by the defendants to justify their application. They can be summarised as follows:

(i) The amended writ of summons and amended statement of claim dated 18 April 2017 did not disclose a reasonable cause of action or recognisable cause of action against the defendants in this action. They further claimed that the plaintiff's action was obviously unsustainable in law;

(ii) The plaintiff's action contravened O. 53 of the ROC since the decision of the SA in cancelling the approval of plaintiff's application for TOL can only be challenged in court by way of judicial review instead of by writ of summons. Hence the plaintiff's action was an abuse of court process;

(iii) The plaintiff's claims against the defendants were caught by limitation under the Public Authorities Protection Act 1948 (PAPA).

The Law On Order 18 rule 19

[7] Order 18 r. 19 states as follows:

Striking out pleadings and endorsements (O. 18 r. 19)

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:

(a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)(a).

(3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

[8] The power of the courts under the four grounds of this rule is exercised when it can clearly be seen that a claim or answer is *prima facie* obviously unsustainable. In other words, in the context of the present case, it is plain and obvious that the plaintiff cannot succeed in their action against the first, second and third defendants. (see *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 2 AMR 1969; [1993] 3 MLJ 36; *Cepatwawasan Group Bhd & Anor v. Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors* [2008] 2 CLJ 620; [2008] 2 AMR 504; [2008] 2 MLJ 915; *Linde Gas Malaysia Sdn Bhd v. Pasifik Utama Sdn Bhd & Anor* [2011] 5 CLJ 40.

[9] Specifically, as to ground (b), it has been held that the words "frivolous or vexatious" means "obviously unsustainable" or groundless (see *Technointan Holding Sdn Bhd v. Tetuan Tan Kim Siong & Teh Hong Jet* [2006] 7 CLJ 541 and *Lau Siang Kok v. Datuk Seri Panglima Lau Cho Kun* [2013] 1 CLJ 619; [2013] 6 AMR 114; [2013] 2 MLJ 889).

[10] In evaluating whether the proceedings at hand are vexatious or frivolous, a party is entitled to look at the whole history of the matter and it is not to be determined by whether the pleading discloses a cause of action or not (see *Middy Industries Sdn Bhd & Ors v. Arensi-Marley (M) Sdn Bhd* [2012] 1 LNS 830; [2013] 3 MLJ 511).

[11] As for ground (d), the term "abuse of the process of the court" includes considerations of public policy and the interests of justice and means that court processes must be used *bona fide* and properly. The courts will prevent their machinery from being used as a means of oppression (see *Castro v. Murray* [1875] 10 Ex 213; *Gabriel Peter & Partners (suing as a firm) v. Wee Chong Jin* [1998] 1 SLR 374; *Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd* [2011] 1 CLJ 285; [2011] 1 AMR 21; [2011] 2 MLJ 192).

Defendants' Submission

[12] On the first issue, the defendants argued that the granting of the TOL to the plaintiff revolved around the contents of the said letter issued by the first defendant. Their contention was that the wordings of the provisions of

the TOL contained in the said letter were plain and unambiguous. The relevant provisions made on the issuance of the TOL as set out in the letter are as follows:

> Majlis Bersetuju
>
> I. mengeluarkan satu Lesen Pendudukan Sementara di atas kawasan seluas 12.140 hektar (30 ekar) di Wilayah Pasir Panjang Mukim Pengkalan Bharu Daerah Manjung ... kepada Blue Ocean Biotech Sdn. Bhd. untuk tujuan Pertanian (Ternakan Ikan) di bawah Seksyen (1)(a) Kanun Tanah Negara (Akta 56/1965) dengan dikenakan perjanjian dan syarat-syarat seperti berikut:
>
> (a) Tempoh: Satu (1) tahun
>
> (b) Bayaran: RM250.00 sehektar atau sebahagian daripadanya setahun
>
> (c) Syarat-syarat tertentu:
>
> (i) Tanah yang dengan ini dikeluarkan Lesen Pendudukan Sementara hendaklah digunakan untuk tujuan Pertanian Ternakan Ikan;
>
> (ii) Pembinaan bangunan jenis kekal atau separuh kekal sekali-kali tidak dibenarkan;
>
> (iii) Lesen ini tidak dibenarkan untuk disewa, dipajak atau dipindahmilik kepada sesiapa pun;
>
> (iv) *Lesen in akan dibatalkan pada bila-bila masa tanpa bayaran gantirugi jika didapati pelesenan melanggar syarat-syarat seperti yang tersebut di atas atau jika tanah ini dikehendaki oleh kerajaan;*
>
> (v) **Jika lesen dibatalkan adalah menjadi tanggungjawab pelesen untuk mengosongkan kawasan ini dengan segera atas perbelanjaan sendiri;**
>
> (vi) Pemilik hendaklah mematuhi syarat-syarat, yang ditetapkan oleh Jabatan-Jabatan dan Agensi-Agensi Kerajaan; dan
>
> (vii) Pemilik hendaklah menjelaskan bayaran Lesen Pendudukan Sementara mulai tahun semasa yang diluluskan.
>
> II. *Memberikuasa kepada Pentadbir Manjung untuk membaharui Lesen Pendudukan Sementara kepada pelesen sebanyak lima (5) kali pembaharuan sekiranya Pentadbir Tanah berpuashati dengan kemajuan di atas tapak yang dilesenkan itu.* (emphasis added)

[13] The defendants contend that the plaintiff accepted the TOL without any complaints or reservations. Before embarking further on the provisions to the TOL it is appropriate to first consider those provisions that enabled the SA to issue such licences.

[14] Reference is made to s. 65 of the NLC which states as follows:

Power to licence temporary occupation of State land, mining land and reserved land.

(1) The State Authority may, in accordance with the provisions of this Chapter and of any rules under section 14, **permit the temporary occupation under licence** of:

(a) State land;

(b) mining land not for the time being used for the purposes of mining;

(c) reserved land not for the time being used for the purposes for which it was reserved.

(2) Temporary occupation licences may be issued for any purpose other than one prohibited by sub-section (2) of section 42.

(emphasis added)

[15] The conditions as to which the SA can issue TOL is found in s. 67 NLC.

Duration, conditions, etc, and form of temporary occupation licences.

(1) *Except in so far as it is otherwise prescribed, every temporary occupation licence other than one to which section 69 applies (that is to say, a temporary occupation licence combined with a permit to extract and remove rock material) shall be issued for a term expiring not later than the end of the calendar year in which it commences, and subject to sub-section (3) may be renewed annually*:

Provided that a licence issued for the purpose of enabling any public exhibition or entertainment to be held may be issued for such other term as may be appropriate in the circumstances.

(2) Every temporary occupation licence shall have effect **subject to such provisions as may be contained therein and so far as not inconsistent therewith, to any other provisions which may be prescribed**.

(3) Subject to the condition under which a temporary occupation licence is issued, the Land Administrator may on the application of a licensee renew such a licence for a term of not more than one calendar year.

Provided that there shall not be more than three renewals made in respect of a temporary occupation licence unless a prior written approval of the State Authority has been obtained.

(4) Every temporary occupation licence other than one to which section 69 applies shall be in Form 4A and in the case of renewal of such licence it shall be endorsed with a note of such renewal and the date of its intended expiry. (emphasis added)

[16] The defendants argued the SA had granted the plaintiff permission to occupy State land subject to certain conditions contained in the licence itself. In the present case, the SA had the right to terminate the TOL as it was specified in the licence that the SA could terminate the TOL at any time if the said land was required by the Government.

[17] The defendants further maintained that the SA was the highest authority concerning all matters regarding land. It had the absolute discretion to grant or refuse any alienation or occupation to land or impose conditions to any TOL. This discretion had statutory force in the form of ss. 42, 65, 66 and 67 of the NLC. They stated that although the TOL could be renewed up to five times, each renewal was at the discretion of the SA. There was thus no obligation on the part of the authorities to grant a renewal of a temporary licence for any subsequent year. The defendants relied on the authorities of *Piagamas Maju Sdn Bhd lwn. Pengarah Tanah Dan Galian Negeri Selangor & Satu Lagi* [2013] 2 CLJ 824 and *Majlis Amanah Rakyat (MARA) v. Tam Seek Hong & Ors* [1994] 3 CLJ 64 to advance their argument. Consequently, they argued that the plaintiff's amended writ and amended statement of claim disclosed no reasonable cause of action.

[18] On the second issue in relation to the mode of commencement, the defendants vehemently argued that the plaintiff should have proceeded by way of judicial review under O. 53 of the ROC as the SA, which is a public authority, had decided to terminate the TOL. There was therefore a public law element in the plaintiff's action. In not commencing their action under O. 53, the defendants contend the plaintiff had circumvented the stringent procedures of O. 53 in commencing their action. The defendants contend that this action of the plaintiff was therefore an abuse of the process of the court.

[19] The defendants, on the third issue challenged that the plaintiff's action was caught by limitation by virtue of s. 2(a) of the PAPA. It was contended that the cause of action, if any, arose when the plaintiff was notified of the cancellation of the TOL. In the present case, the plaintiff was notified of the cancellation of the TOL on 27 November 2012 through the cancellation letter.

[20] This cancellation letter was exhibited in the supporting affidavit of this application in encl. 16. The relevant part of the said letter reads:

> Adalah saya merujuk kepada perkara di atas, dimaklumkan bahawa Pihak Berkuasa Negeri melalui Perjumpaan Majlis Mesyuarat Kerajaan Bil. 1718 pada 10.10.2012 semasa mempertimbangkan Kertas Mesyuarat Bil. 1660/10/10/2012 dan memutuskan seperti berikut:
>
> > I. DIBATALKAN keputusan MMK Bil. 1616 Pada 24.3.2010 Kertas Mesyuarat 172/03/02/2010, iaitu kelulusan permohonan Blue Ocean Biotech Sdn. Bhd. untuk mendapatkan Lesen Pendudukan Sementara bagi tujuan Pertanian (Ternakan Ikan) di atas tanah kerajaan seluas kira-kira 12.140 hektar (30 ekar) di Wilayah Pasir Panjang Mukim Pengkalan Bharu Daerah Manjung di bawah Seksyen 65(I) (a) Kanun Tanah Negara (Akta 56/1965).

[21] The writ of summons and the statement of claim to this present action were filed by the plaintiff on 27 February 2017. This action was therefore commenced approximately four years four months after the Majlis

Mesyuarat Kerajaan had cancelled the TOL granted to the plaintiff on 10 October 2012. On that basis, the defendants assert that limitation had set in and the plaintiff's claim should be struck off.

Plaintiff's Submission

[22] On the first issue, the plaintiff stressed that this is not a "plain and obvious" case nor was their case "obviously unsustainable". In their written submission, the plaintiff relied on the oft-quoted cases of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 and *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1. The plaintiff also asserted that the circumstances created by the defendants were such that they were in legitimate expectation that the TOL would be renewed for five successive years.

[23] On the second issue as to the mode of commencement, the plaintiff argued that their action was outside the scope O. 53 of the ROC and the time frame attached to it. In furtherance of this, the plaintiff states that the claim against the defendants involved elements of private law rather than public law. The plaintiff proceeds to say that s. 67 of the NLC only allowed TOL to be given on a yearly basis. In this case, the State Authorities had, according to the said letter, allowing for the TOL to be renewed for five years. That being so the granting of TOL in those circumstances brought this matter out of the ambit of public law and into the realm of private law. The plaintiff argued that it was not obligatory that just because the action was concerned with a public body the mode of commencement must necessarily be one under O. 53.

[24] Finally, on the issue of the plaintiff's action being barred by limitation because of s. 2(a) of the PAPA, the plaintiff states that they had prayed for declaratory orders. Their action therefore was not affected by any limitation period. To support this proposition, the plaintiff depended on the Court of Appeal case of *Balare Jabu & Ors v. Merawa Sdn Bhd & Ors* [2011] 4 CLJ 751.

Findings Of The Court

[25] As regards to the first issue, I find merit in the defendants' argument that under the provisions for granting the TOL, the State Authority can, at any time decline to renew the TOL if for any reason, the Government requires the said land back. This can be seen at para. 1(c)(iv) of the said letter which states:

> Lesen in akan dibatalkan pada bila-bila masa tanpa bayaran gantirugi jika didapati pelesenan melanggar syarat-syarat seperti yang tersebut di atas atau jika tanah ini dikehendaki oleh kerajaan;

[26] The said land being under TOL, the plaintiff did not have any proprietary rights over it. The plaintiff was merely permitted to occupy the said land at a yearly licence. I find support for this proposition in the case

of *Papoo v. Veeriah* [1959] 1 LNS 70 where it was held that a "temporary occupation license is exactly what the name implies. It is a licence to occupy and nothing more".

[27] Learned counsel for the plaintiff had submitted that the plaintiff had a right to five yearly renewals in accordance with para. (II) of the said letter. This however has to be looked at in light of s. 67(1) of the NLC which provides that every temporary occupation licence shall be issued for a term expiring not later than the end of the calendar year and the provision in the said letter that provides that the SA can cancel the TOL at any time. It is appropriate at this point to refer to the case of *Majlis Amanah Rakyat (MARA) v. Tam Seek Hong & Ors* [1994] 3 CLJ 64 where in explaining the character of TOL, Malik Ishak J (as he then was) succinctly stated:

> Much fuss was made by the defendants that being holders of TOLs they were entitled to be compensated. The brief recital of the facts showed that the defendants or at least one of them had a TOL for 1984 only. Temporary occupation licences are issued under ss. 66 and 67 of the National Land Code 1965 for a term expiring not later than the end of the calendar year in which they commence except that a temporary occupation licence combined with a permit to remove rock material may be issued for a longer period under s. 69 of the National Land Code. **Though there is provision under the National Land Code for temporary occupation licences to be renewed annually yet there is no obligation on the part of the authorities to grant a renewal of a temporary licence for any subsequent year**. It was submitted that the defendants held TOLs since 1961, but this would not bring the defendants anywhere closer to their dream of being compensated. In my judgment, the defendants who occupied the said land on temporary occupation licences cannot acquire a right to be compensated by either a subsequent holder of a temporary occupation licence of the said land or by a subsequent registered proprietor like that of the plaintiff for any expenses that the defendants might have incurred over the said land during the period which they occupied it under temporary occupation licences. (emphasis added)

[28] Counsel for the plaintiff had submitted that they had the legitimate expectation that the TOL will be renewed as they had expanded a huge sum of money on infrastructure with the expectation that there would be five renewals of the TOL. With respect, I cannot agree with this contention. The provisions for the TOL in the said letter clearly stated that the SA could cancel the TOL at any time without any compensation being paid to the plaintiff. It was also not disputed that the SA had on a previous occasion rejected the plaintiff's application for the said TOL to be converted into a 99-year lease. Thus, it should have dawned on the plaintiff that the SA had no intention of granting any more than the right to merely occupy the said land under TOL. The plaintiff accordingly incurred these expenses fully aware that they would not be recoverable in the event the TOL was cancelled.

[29] I therefore find that it is plain and obvious that the defendants had the right to issue the cancellation letter. It is further observed that there is no statutory duty for the SA to explain the reason for the cancellation of the TOL. The Federal Court in the case of *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105 stated as such in relation to s. 65 of the Immigration Act 1959/1963 where, in my opinion, the principle of which would be applicable to this present case. This is what the Federal Court stated in *Sugumar Balakrishnan*'s case:

> In considering the words in s. 65(1)(c), it is clear that there is no express statutory duty imposed on the State Authority to give reasons to the respondent. Insofar as the common law position is concerned, we adopt the proposition that was stated in *Marta Stefan (supra)* that the trend of the law is towards giving reasons, but on a case by case basis. *However the trend has not lost sight of the established position of the law that there is no general duty universally imposed on all decision makers ... It therefore follows that the director cannot be expected to provide reasons to the respondent since the director is merely carrying out the directions of the State Authority*.
>
> (emphasis added)

[30] Regarding the second issue as to the mode of commencement, I accept learned plaintiff's counsel's submission that whether O. 53 is the correct mode of commencement depended on the facts of each case. This proposition is supported in the case of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865 where the Federal Court held that:

> **We observed that a challenge on the use of appropriate procedure is very much fact based**. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has a substantial public law element then the procedure under O. 53 RHC must be adopted. Otherwise, it may be set aside on the ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 RHC is not suitable. Aside from this, there could be other circumstances like the kind in *YAB Dato' Dr. Zambry*. **Much depends on the facts of the case**. (emphasis added)

In the present case, it was not contested that the plaintiff had made use of the land for commercial purposes. The relationship between the plaintiff and the SA leans more towards a contractual relationship. The nature of the damages claimed including loss of profit makes this case more amenable to an action by way of writ. Further, the plaintiff's claim is monetary in nature rather than a substantive right. In the circumstances, I cannot agree with the defendants' contention that the plaintiff should have proceeded by way of

judicial review under O. 53 of the ROC. In the final analysis, the facts in the case show a mixture of private and public law with the private law element dominating the public law element.

[31] As to the third issue, I hold that the action brought by the plaintiff was time-barred by virtue of s. 2(a) of the PAPA as it was commenced some four years and four months after the TOL had been cancelled by the SA. There was no explanation for this delay. It is appropriate at this juncture to refer to s. 2(a) of the PAPA which states as follows:

> Protection of persons acting in execution of statutory or other public duty
>
> 2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;
>
> (b) ...

[32] As stated earlier, learned counsel for the plaintiff had relied on the Court of Appeal case of *Balare Jabu & Ors (supra)* for the proposition that limitation does not apply where the orders prayed for are declaratory in nature. There, the Court of Appeal stated as follows:

> While limitation appears to be a complete answer to a suit, action or proceeding for remedy, it is no answer to a suit, action or proceeding for declaratory orders. A declaration whether the issuance of a licence is subject to native customary rights and whether the 2nd and 3rd respondents were in breach of a fiduciary duty pertaining to constitutional rights of the appellants, to know whether they have been wronged or not, is not purely academic.

[33] *Balare Jabu & Ors* (*supra*) went on appeal to the Federal Court and is reported as *Director of Forests, Sarawak & Anor v. Balare Jabu & Ors And Another* [2012] 7 CLJ 685. The Federal Court held that the respondents (the plaintiffs in the High Court) had commenced their action within the 36 months as required by second limb of s. 2(a) of the PAPA. Based on the Federal Court's findings, limitation under s. 2(a) of the PAPA was therefore not an issue in *Balare Jabu & Ors* as the Federal Court had found that the respondents had commenced their action within the time frame of 36 months. The Federal Court held that there was a "continuance of injury" which had yet to cease. The crux of the matter there was that as long as the licence was valid, it was subject to Forest Ordinance which protected the

rights of the natives therein. It is pertinent to note that the Federal Court never in its judgment says that the limitation law is suspended insofar as declaratory prayers are concerned. In stating this, I am supported by the pronouncement of Ravinthran Paramaguru J in *Ho Nim Tsin v. The Director Of Land And Survey Department & Anor* [2013] 5 CLJ 1004 where the learned judge stated the same in his judgment.

[34] I shall now touch on the cases of *SR Katherine Lim KH v. Ketua Pengarah Perkhidmatan Perubatan Malaysia, Kementerian Kesihatan Malaysia & Ors* [1997] 2 CLJ 564 CA, *Datuk Syed Kechik bin Syed Mohamed v. Government of Malaysia & Anor* [1978] 1 LNS 44 FC and *Teh Guan Teik v. Inspector-General of Police & Anor* [1998] 3 CLJ 153 FC which were referred to by the appellants in *Balare Jabu & Ors* (*supra*) to advance the argument that applications for declaratory orders are not subject to limitation.

[35] On perusing *Datuk Syed Kechik bin Syed Mohamed* (*supra*) and *Teh Guan Teik* (*supra)* I found that these cases were not concerned with s. 2(a) of the Public Authorities Protection Act 1948 at all and were distinguishable. In *Datuk Syed Kechik*'s case, the issue was whether the court could grant declarations asked for which were premature and hypothetical. In *Teh Guan Teik*'s case the issue was whether the appellant could rely on declarations made in a writ action when he was clearly out of time to commence proceedings under O. 53 of the RHC for a judicial review. In any event, the Court of Appeal had considered *Teh Guan Teik*'s case in *Litus Jau & Anor v. Boustead Pelita Tinjar Sdn Bhd & Ors* [2014] 1 CLJ 880 and definitively stated the following:

> Learned counsel for the plaintiffs submitted that the issue of the limitation period under s. 2 of the PAPA and the SLO has no application since the plaintiffs' prayers were for declaratory orders. To support his argument, he relied on the decision of Court of Appeal and Federal Court in *Director of Forest Sarawak & Anor v. Balare Jabu & Ors And Another Appeal* [2012] 7 CLJ 685 (*Balare Jabu*) and the Federal Court case of *Teh Guan Teik v. Inspector General of Police & Anor* [1998] 3 CLJ 153; [1998] 3 MLJ 137 (*Teh Guan Teik*).
>
> We have read the Federal Court judgment of *Teh Guan Teik* in great detail and with respect we find that the decision of the same cannot possibly lend any assistance in the contextual fact of the matter in issue. We say this as in *Teh Guan Teik*'s case the issue before the Federal Court was whether the appellant (Teh) who was dismissed from his employment as a police sergeant could pursue the challenge on his dismissal *vide* a declaration when an action for *certiorari* was out of time. **Further, we are of the view that with the recent Federal Court decision of *Ahmad Jefri*, the case of *Teh Guan Teik* can no longer be the correct position of the law**. (emphasis added)

As for the case of *SR Katherine Lim KH* (*supra*), the Court of Appeal in fact found that s. 2(a) of the PAPA did apply to the facts of the case. In coming to this conclusion, the Court of Appeal stated:

A There is, therefore, no necessity for us to dwell on the merits. We are in full agreement with the findings of the learned trial Judge. **On the limitation point alone, we have to dismiss her appeal with costs and order that the deposit is to go the respondents to the account of their taxed costs**. (emphasis added)

B **[36]** In contrast, the cases relied on by the defendants namely *Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam & Anor* [2006] 2 CLJ 150 and *Hj Hussin Hj Ali & Ors. v. Datuk Hj Mohamed Yaacob & Ors. & Other Cases* [1983] 2 CLJ 68; [1983] CLJ (Rep) 165; [1983] 2 MLJ 227 were precisely on point with the present case. These cases were begun by writ and had also asked for
C declaratory orders. Both these cases were affirmed by the Federal Court which held that s. 2(a) of the PAPA applied and dismissed the plaintiff's writ and statement of claim because they breached s. 2(a) of the PAPA and were time barred. The Federal Court decision of *Selvaraju Ponniah* (*supra*) is reported as *Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 6 CLJ 245. Here, the appellant sort a declaration that his
D dismissal was null and void and of no effect on the ground that it was based on an invalid detention order. The Federal Court stated that s. 2(a) of the PAPA was mandatory in its terms. The word 'shall' is used twice in that section indicating that "the 36 months period in respect of time is a mandatory requirement and it cannot be abridged". In *Hj Hussin Hj Ali* (*supra*)
E the appellants sort declarations that the State Government acted unconstitutionally in dismissing them as Penghulus and that such dismissal was contrary to the Federal Constitution. In dismissing the appeal, the Federal Court agreed with the State Legal Adviser that the appellants had filed their respective actions too late they were statute-barred by s. 2(a) of
F the Public Authorities Protection Act 1948. It appears that the Federal Court decisions of *Selvaraju Ponniah* (*supra*) and *Hj Hussin Hj Ali* (*supra*) were not referred to in *Balare Jabu & Ors*.

[37] Further, although the plaintiff had prayed for various declarations, these declarations lack enforceability as the said land had already been
G occupied by the third defendant for nearly six years. It is an agreed fact also that the said land was transferred to the third defendant on 10 October 2012 to start a fish breeding factory. I am of the opinion that the declarations prayed for in the instant case are ways or means employed by the plaintiff to recover damages for the loss of use of the said land, compensation for
H infrastructure constructed on the said land and special damages together with interest which were pleaded in the statement of claim at paras. 17, 18 and 19(f)(g)(h) and (i). In view of this, it is exceedingly clear that these prayers read together with other prayers in the plaintiff's claim would therefore come within the ambit of s. 2(a) of the PAPA. See *Husli Mok v. Superintendent Of*
I *Lands & Survey & Anor* [2012] 1 LNS 969.

[38] Consequently, I find that the plaintiff's action falls because of limitation. I am of the view that any action brought outside the limitation period to commence the action can be struck out for being frivolous, scandalous and vexatious and also an abuse of the process of the court. See *Tan Sri Dato' Eric Chia Eng Hock v. NKK Corporation (Japan))* [2004] 7 CLJ 137; [2005] 2 AMR 343; *Lim Lek Yan @ Lim Teck Yam v. Yayasan Melaka* [2013] 1 CLJ 1081; [2012] MLJU 546; *Tan Sri Halim Saad v. Tan Sri Nor Mohamed Yakcop & Ors* [2014] 4 CLJ 232; [2014] AMEJ 0372.

Conclusion

[39] To conclude, I find that the plaintiff's writ and statement of claim do not disclose a reasonable cause of action. I also find that the plaintiff's claim is an abuse of the process of the court and frivolous, scandalous and vexatious as it was brought outside the limitation period. For those reasons, I allow the defendants' application to strike out the plaintiff's claim. I also award cost of RM1,000 to the first and second defendants.